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November 20, 2000

VIA FACSIMILE AND U.S. MAIL

Mr. Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, California 95812-2000

Re: SWRCB November 20, 2000 Workshop Regarding Improving The Water
Right Process And Procedures

Dear Mr. Schueller:

This firm represents various water purveyors throughout California. We are submitting these comments for the State Water Resources Control Board's November 27 workshop on improving the water-right process and procedures.

At the outset, we would like to thank the State Board for holding this workshop. For the reasons that are discussed in this letter, we believe that there are several areas where the State Board can significantly improve its processing of water-rights matters.

1. Applications and Petitions Processing

We realize that many of the delays that have occurred during the past several years in processing applications for new water rights and petitions to amend existing water rights are due to staff shortages, and we hope that the State Board will be able to promptly fill existing vacancies.

In addition to filling staff vacancies, we believe that there are other actions that the State Board can take to make its processing of water-right applications and petitions more efficient. We offer the following suggestions:

When applications and petitions are filed with the State Board, it often takes several months, and sometimes even years, before the State Board formally either accepts or rejects the application or petition. The State Board should adopt a regulation specifying a maximum amount of time, like 30 days, for the State either to formally accept an application or petition or notify the applicant or petitioner of why the application or petition is not being accepted. With a clear period for action,

this step of the process will proceed more rapidly than it has in the past.

The next step of the process, the issuance of a public notice of the application or petition, also often has been delayed for several months, and sometimes even years, in the past. The State Board should adopt another regulation, specifying the maximum amount of time, like 60 days, for the State Board to notify the application or petitioner that the notice has been issued or to tell the applicant or petitioner what additional information the applicant or petitioner must provide before the public notice will be issued. As with the first step of the process, a clear period specified in a State Board regulation will expedite this second step of the process.

After protests and answers have been filed, the State Board should use its authority under Water Code section 1335 more often to narrow the issues on which a hearing actually is needed. This statute authorizes the State Board to require protestants to supply additional information to support their protests, and, if they do not, to dismiss their protests. Under its present practice, State Board hearings often are not limited to the issues raised by protests and supported by substantial evidence. Vigorous and frequent use of this authority would allow the State Board to significantly narrow the issues on which hearings must be held, which in turn would make the entire water-right process much more efficient.

Finally, once the unresolved issues have been determined, the State Board should proceed to promptly schedule hearings on them.

2. Compliance and Enforcement

Many of the same actions that would expedite processing of applications and petitions also would improve the State Board's processing of complaints and enforcement actions. Under the present practice, complaints often are filed and then remain pending for years without any State Board action. The State Board should adopt regulations specifying the minimum information that must be in a complaint for it to be valid. These regulations also should specify the subject matters that are proper subjects for complaints. Under its present practice, the State Board often accepts complaints that concern matters outside of the State Board's jurisdiction, including, for example disputes among holders of riparian and pre-1914 appropriative rights.

After receiving complaints, the State Board then should promptly review them and, when appropriate, require complainants to submit additional information to substantiate their complaints. This process will allow the State Board to significantly narrow the issues on which hearings must be held.

3. Licensing

The State Board's water-right licensing process also would benefit from new regulations. These regulations should clearly specify the evidence that the State Board will consider during the licensing process and the precise standards that the State Board will apply when it processes

licensing applications and issues licenses. Under the present process, most of the State Board's licensing standards are not contained in any regulations and the State Board's processing of license applications often takes many years. The State Board should avoid relying on policies that are "underground regulations."

4. Hearings

The State Board's hearings process needs several improvements.

First, the hearing officers and staff counsel need specialized training in the rules of evidence and the conduct of hearings. Other state agencies like the Public Utilities Commission and the Office of Administrative Hearings use hearing officers with formal training in these areas for all of their adjudicatory hearings. The State Board should have its hearing personnel receive the same levels of training. This training will allow hearings to proceed much more efficiently and also will result in hearings that better protect the participants' legal rights.

Second, before hearing notices are issued, the State Board should hold pre-hearing conferences so that the parties have opportunities to comment on the hearing issues. This process will allow hearings to be focused on the issues that actually were raised by valid protests and complaints.

Third, hearing notices should be issued far earlier than they have been in the recent past. Under present procedures, the deadlines for submitting exhibits and written testimony usually are less than one month after the dates on which the hearing notices are issued. This is not sufficient time to prepare the complex technical exhibits and testimony that often are necessary to address water-right issues. As a result, written submissions often are not well-organized, corrections are necessary, and parties often attempt to offer substantial additional evidence at the hearing.

Although the parties sometimes have some ideas about the hearing issues before the notices are issued, the parties usually do not know what all of the hearing issues are going to be, and the parties never receive the details of the hearing issues until they receive the hearing notice. We recommend that the State Board change its normal practice so that the parties will have at least three months between the date when the hearing notice is issued and the date when written exhibits and testimony must be filed. This longer time frame will result in higher-quality written submissions and also will allow everyone to avoid many of the calendar conflicts that result from short notice periods.

Fourth, the State Board staff needs to be completely impartial during hearings. During past hearings, State Board staff members often have conducted aggressive cross-examination of one party's witnesses and asked friendly, leading questions of another party's witnesses. The State Board staff almost always gives greater weight to evidence and arguments submitted by state and federal agencies and rarely asks these witnesses any rigorous questions, even when their evidence and arguments are not based on sound technical or legal analyses. On the other hand, State Board

staff members often show considerable doubt about, and sometimes open hostility toward, evidence and arguments submitted by other parties. This is totally inappropriate. The State Board's hearing process must be truly neutral and impartial. For this reason, State Board staff members should rarely, if ever, appear as advocates during State Board hearings. If such appearances are absolutely necessary, then the State Board's notice should state why such appearance is necessary and what is being done to make the process impartial despite such appearance.

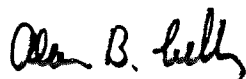
Fifth, State Board staff needs to be completely impartial when it prepares draft decisions. In the past, draft decisions often have accepted one party's submissions virtually without question and unfairly discounted, or totally ignored, contrary evidence submitted by another party. This is completely inappropriate. Draft decisions must contain fair and impartial analyses of the evidence and arguments.

Finally, all of the State Board's members, and not just the hearing officer, need to carefully review each draft decision, the administrative record for the hearing that led to the draft decision, and the parties' comments on the draft decision. This careful review is necessary to insure that the draft decision really is fair and impartial and is not based on biased interpretations of the evidence. Because water-right decisions are so critically important in California, State Board members should not just accept staff's draft decisions without question. State Board members also should consider authoring dissenting opinions, as appellate court justices often do, where they disagree with parts or all of the decision that is adopted by a board majority.

5. Conclusion

We appreciate the opportunity to submit these comments and we look forward to discussing them at the November 27 workshop.

Very truly yours,

A handwritten signature in black ink, appearing to read "Alan B. Lilly". The signature is fluid and cursive, with the first name "Alan" and last name "Lilly" clearly distinguishable.

ALAN B. LILLY

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